



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

Sampson . Discourse on the Common
Law. 1824

339
15

US 339,15

**Harvard College
Library**

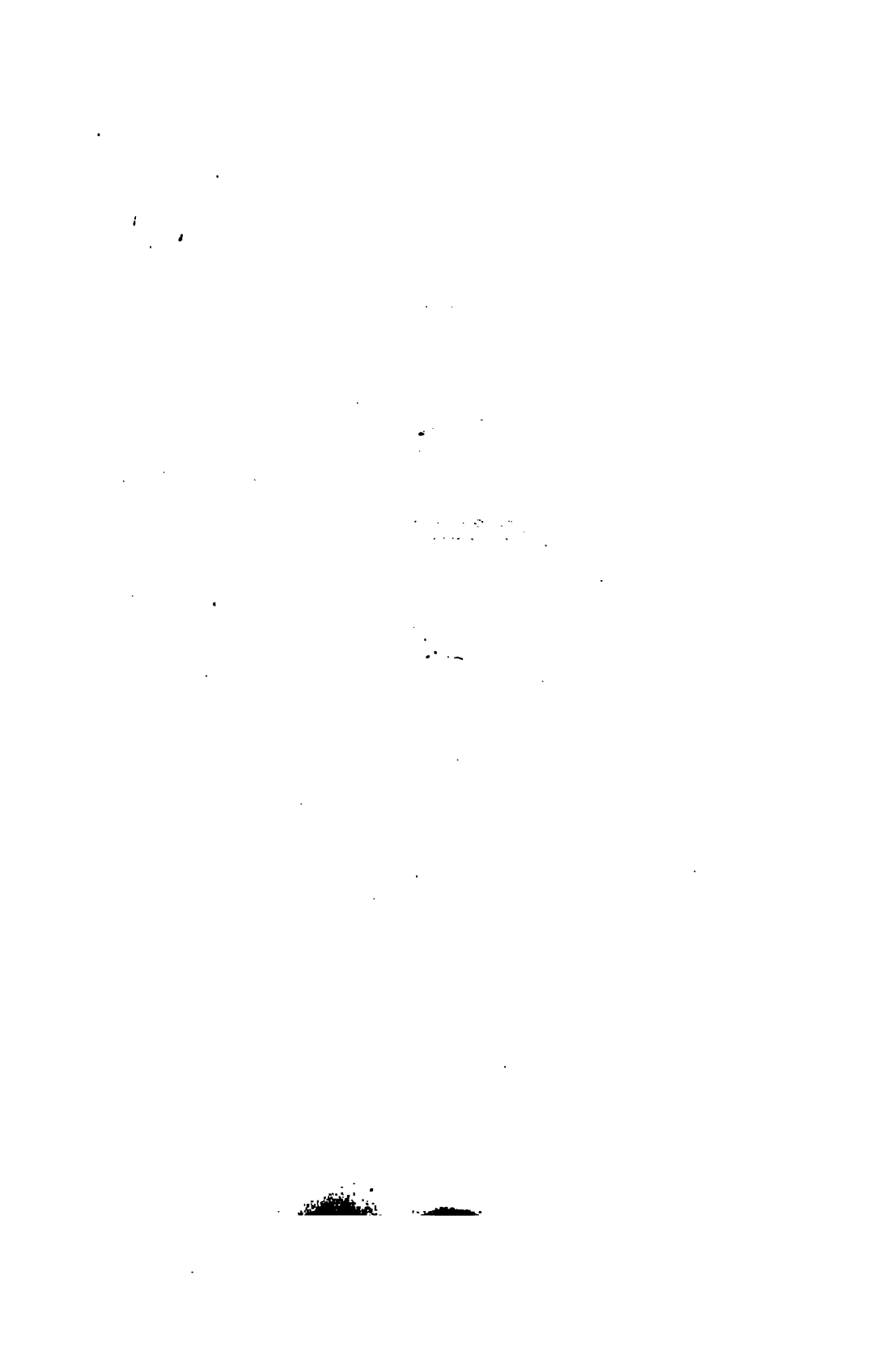


By Exchange

10.1.10
X

No 9.

AN
ANNIVERSARY DISCOURSE
DELIVERED BEFORE
The New-York Historical Society,
ON THE
COMMON LAW.



AN

ANNIVERSARY DISCOURSE,

DELIVERED BEFORE THE

Historical Society

OF

NEW-YORK,

ON SATURDAY, DECEMBER 6, 1823;

SHOWING THE

ORIGIN, PROGRESS, ANTIQUITIES, CURIOSITIES, AND NATURE

OF THE

COMMON LAW.



BY WILLIAM SAMPSON, ESQ.



In nova fert animus mutatas dicere formas
Corpora. Di ceptis (nam vos mutastis et illas)
Adepirate meis: primæque ab origine mundi
Ad mea perpetuum deducite tempora carmen.

OVID, MET. LIB. I.

New-York:

PUBLISHED BY E. BLISS AND E. WHITE, 128 BROADWAY.



Abraham Paul, printer.

.....

1824.

HARVARD COLLEGE LIBRARY
BY EXCHANGE

JUL 8 1937

45 339.15
✓

Southern District of New-York, ss.

BE IT REMEMBERED, that on the twenty-fourth day of December, in the forty-eighth year of the Independence of the United States of America, *William Sampson*, of the said district, hath deposited in this office the title of a book, the right whereof he claims as Author, in the words following, to wit:

"An Anniversary Discourse, delivered before the Historical Society of New-York, on Saturday, December 6, 1823; showing the origin, progress, antiquities, curiosities, and nature of the Common Law. By William Sampson, Esq.

In nova fert animus mutatas dicere formas

Corpora. Di coeptis (nam vos mutastis et illas)

Adspirate meis: primaque ab origine mundi

Ad mea perpetuum deducite tempora carmen....*Ovid, Met. Lib. I.*"

In conformity to the Act of Congress of the United States, entitled "an Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books to the authors and proprietors of such copies, during the time therein mentioned." And also to an Act, entitled "an Act, supplementary to an Act, entitled an Act for the encouragement of Learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL, *Clerk of the Southern District of New-York.*

At a meeting of the NEW-YORK HISTORICAL SOCIETY, held at the hall of the college of physicians and surgeons, on the sixth of December, 1823,

Resolved, that the thanks of the Society be presented to William Sampson, Esq. for his learned and instructive oration, delivered before them this day, and that he be requested to furnish a copy for publication.

Resolved, that Henry Wheaton, John Anthon, and Anthony L. Bleecker Esqrs. be a committee to communicate to Mr. Sampson the above resolution.

W. B. LAURENCE,

Recording Secretary, pro tem.



DISCOURSE.



MR. PRESIDENT,

WHEN honoured with the invitation, which brings me now in the presence of this distinguished audience, I did not hesitate to comply, for I considered that our society in its young beginnings, might need the co-operation of every member, and that the promptest obedience to its call, would be the best title to its indulgence; and in the choice of a topic, I preferred that branch of our history, in which my education and habits of study and reflection, might best qualify me to occupy a vacant ground. The subject is doubtless an important one, though it may at first bring me but small countenance from some of my polite hearers, when I announce to them, that the discourse I have meditated, is on the history of our law.

The law has, indeed, been too long banished from
the communion of the liberal sciences, proscribed as

a dry and crabbed art, interesting only to those who practise it for gain ; as though its spirit were all disingenuous mystery, its language a barbarous jargon, its root in savage antiquity, its growth through ages of darkness, its fruits but bitterness and vexation : and this in despite of the high and lofty panegyrics hourly bestowed upon it by its admirers.

It is time that these differences should be reconciled. The well-being of society requires that a subject of such vital importance, should be brought to the test of reason in the open light of day. The law of a free people should never be a matter of indifference. It is supposed to be the public reason, uttered by the public voice ; and in proportion to its wisdom, will be the dignity of the people. It is the school of public morals ; and next to religion, that which has most influence on the manners and happiness of a nation. It is the guide of all our actions, and the rule of all our conduct. It is the part of a good citizen to love the laws, and the duty of every one to obey them ; but that love should be without bigotry, and that obedience without servility. The efficacy of the law depends on the confidence it creates, and it never will inspire so much confidence, as when it lays aside the veil of mystery, and presents itself in all the simple majesty of truth. Appearing

as a human, not a preternatural institution, its defects will be excused, its excellencies acknowledged, and what is most desirable, it will advance with a free and unimpeded step towards perfection. Its stubborn forms will be taught to bend to the convenience and exigencies of the people for whose use it subsists. It will be separated from the rubbish and decay of time, and stripped of the parasitical growths that darken and disfigure it.

It is perhaps to be regretted, that the youth who dedicate themselves to the study of our legal constitutions, should be greeted on the threshold with phrases strange to the ears of freedom: that they cannot enter the vestibule without paying constrained devotion to idols which their fathers have levelled in the dust. The Commentaries of Sir William Blackstone are still the only clue whereby to tread the mazy labyrinth through which they have to pass; and the fascinating eloquence of that author, conceals a thousand sophistries dangerous to the principles which every citizen of our free republic ought, and every professor of our laws is sworn, to maintain. Impressions thus stamped on young minds, are not quickly eradicated, and if once taught to believe, that excellence is only to be found abroad, they will not care to seek for it at home. The Commentaries, it is true,

deserve our admiration, and we owe some gratitude to the author, who has rendered the complicated and perplexed code upon which our wiser, though yet imperfect system, has been engrafted, accessible and tangible. What it was before he wrote, may be gathered from this, that the benefactor and founder whose intentions he was appointed to carry into effect, spent half a century in compiling in the most condensed form, four and twenty elephantine folios, to serve as a brief index to the books which even then composed the lawyers' libraries, but are tenfold increased with us, and continue to increase in the like accumulated ratio. Various amendments also, first suggested by Blackstone, have been carried into execution with us, and from the able manner in which he has laid bare many defects and anomalies of the English law, though its professed apologist, we may imagine how he would have written and taught, had it been his fortune to witness, as we do, the wonderful effects of true liberty upon human prosperity and happiness: how a people without hierarchy, nobility, monarchy, distinction of condition, rank, or privilege, can govern themselves, and flourish beyond what hope or fancy could predict. Had he experienced this, and been endowed and appointed to eulogize our laws and constitutions, how ingeniously, how impressively, would he have contrasted them with

the decayed and vicious institutions which he has so extolled.

In soliciting admission for the common law into the seats of academical learning, where its rival, the civil law, had long been a favoured inmate, no advocate ever pleaded his cause with more eloquence and grace, but he could not make that a science, which was reducible to no fixed rules or general principles; and the more he brought it into light, the more the sunny rays of his bright genius fell upon it, the more its grotesque forms became defined, the more they proved to be the wild result of chance and rude convulsions.

The vices of the Norman jurisprudence he exposes with no tender hand. The trial by battle, the forest laws, the curfew, the dependence of the nobles on the crown, and their tyranny over the commons: the feudal exactions and forfeitures; the 60,000 knights bound upon pain of confiscation to quell all resistance; the enslaving of mens' consciences by sour ecclesiastics, who were themselves exempt from the secular power, and who had imported the whole far-rago of superstitious novelties engendered in the blindness and superstition of the times between the first mission of St. Augustine the monk, and the Nor-

man conquest. The administration of both the prayers of the church and the law of the land in a foreign and unknown language: the frittering both law and divinity into logical distinctions and metaphysical subtleties, till what ought to be a plain rule of action, became a science of the greatest intricacy: the interweaving by the scholastic reformers, as he calls them, of their dialect and finesses into the body of the judicial polity, so that they could not be taken out without injury to the substance; and that, though statute after statute was made to pare off the excrescences and restore the common law to (what he calls) its pristine vigour, the scars remained still deep and visible: how the liberality of modern courts was frequently obliged to have recourse to unaccountable fictions and circuities to recover that equitable and substantial justice, which was long totally buried under the narrow rules and fanciful niceties of the metaphysical Norman jurisprudence.*

This picture, truly, is not seducing; and had the author dealt the same measure to the jurisprudence that preceded that of the Normans, instead of the rhapsodies which he has uttered upon its antiquity, its purity, and its *pristine vigour*, it would have been

* 4 Comm. 419.

easy to conclude that the further we were from the one or the other, the better for ourselves. The enthusiasm, however, which grave writers indulge upon this subject, makes it important for us to determine for ourselves, whether there be such a long lost treasure, or whether it be but a fabulous tradition, or fond dream.

If there be such a pure fountain, and that we have profanely troubled it, or foolishly strayed from it, we cannot too soon retrace our steps, and return with penitent devotion,

“ Fonti divino et Genio numinis fontis :”

we must prostrate ourselves before the offended genii of the common law ; appease the celestial and infernal deities of our wise ancestors, the druids ; sooth the angry sun and moon with human victims ; and propitiate both Thor and Woden with costly offerings. The frowning oaks, the troubled fountains, and the dreadful thunder must be placated by all the arts of magic astrology, and augury, known and practised in the times of the “ pristine vigour” of the common law.

It is a matter of infinite importance for us to know our own condition ; and whether we are to look for the preservation and improvement of our laws, to the

experience of our own times and the lights of our own age, or to times long past. It is to history we must be indebted for this important knowledge. History, by concentrating the lights of experience, and furnishing objects of comparison, strengthens the judgment, informs the reason, extends our views of human action, and overturns the baleful sway of prejudice and error: and under no fitter auspices can such an inquiry be set on foot, than those of a society formed for useful and patriotic purposes, composed of men in relation with the learned of other countries, and pledged to high duties in their own.

The plan proposed by the author of the *Commentaries*, may very well serve for our legal historiographer.* To trace the originals as far as distance will permit to the customs of the Britons and the Germans, as recorded by Cesar and Tacitus; to the codes of the northern nations on the continent, and more especially, as he expresses it, to "*our own Saxon* princes;" to the rules of the Roman law, either left in the days of Papinian, or imported by Vacarius and his followers; but, above all, to that inexhaustible reservoir of legal antiquity, the feudal law, called by Spelman, the law of nations in the western

* 1 Comm. 36.

world. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be adduced, their changes and revolutions observed, and it should be shown how far they are connected with, or have been at any time, affected by the civil transactions of the kingdom. A plan of this nature, he adds, if executed with care, cannot fail of administering a most useful entertainment to students of all ranks and professions.

If this ingenious author had pursued his plan by impartially developing the history of these ancient nations, and their codes, we might by simply comparing them with our present condition, judge of the obligations we owe to them, and of the propriety of reverting to them. But he has rather contented himself with certain flights of smooth and specious eloquence, in which he excels all other writers; and where we most needed light, has left us most in darkness.

How far the bombastic encomiums upon the common law, echoed and repeated to satiety, and with a zeal that should render them suspected, have pro-

ceeded originally from pure conviction, or from interested controversies, from which we are happily too far removed to have any concern,* is not so important to us, as to examine for ourselves. Blackstone informs us, that after the Norman conquest, the nation was divided into two parties; the bishops and the clergy, many of them foreigners, who applied themselves solely to the civil and canon law, and the nobility and gentry, who adhered with equal pertinacity to the old common law; both reciprocally jealous of what they were unacquainted with, and neither allowing to the opposite system the merit it possessed.† This observation is profound and true, for the best part of what passes for common law at this day, so far as respects civil transactions, is borrowed from that civil law, although the loan is not acknowledged.

No doubt great names were embarked in these controversies, and their influence has, unfortunately, continued to operate. But we must not be led astray by their authority. Whether they were dupes of opinions that they did not care to investigate too captiously, or honest fanatics, or splenetic partizans who

* See the profound remarks of the learned and accomplished Duponceau, in his Address at the opening of the Law Academy of Philadelphia, Feb. 21, 1821. (notis.)

† 1 Comm. 12.

praised from hatred more than from love, it is time we should assert our own independent judgment, and act and think for ourselves. Some, perhaps, from a pious desire to reconcile the affections of their countrymen to their own laws, have referred them to such high antiquity, and, as it were, divine origin, after the example of the great lawgivers of antiquity, who dared not to trust their ignorant and superstitious subjects with the truth, and therefore feigned traditions, and fabulous communications, with nymphs and goddesses. But with us such mummery is out of date; the people know that their law is the creature of their own power, the work of their own hands, and that if it is not good it is to their own shame, and that canting and ranting will never make it better.

We should reflect too, before we submit to man's authority in matter of opinion, how few in any age have risen above the superstitions of their day, and how few of those have chosen to encounter the current of power, interest, or fashion. Sir Edward Coke, as Blackstone delicately observes, though a man of great learning, was strongly tinctured with the pedantry of the times in which he wrote: he was besides, engaged in bitter controversies, which ended in his destitution. Lord Hale, though above corrup-

tion, was not above prejudice. For he laid down those cruel rules for the conviction of witches, by which innocent victims were put to death even in this land of refuge, even in that cradle of our liberties where the pilgrims, flying from imputed guilt and real persecution, first set their wandering feet.* As to Chancellor Fortescue, who lived before the great discoveries that have since expanded the human faculties, his book in praise of the English Common Law, were it now to fall into the hands of any of our intelligent citizens, without other recommendation than that of its contents, would acquire a praise to which its author did not aspire; and would pass for an ingenious caricature, a pleasant burlesque, and very poignant satire. So it is that false gods, false worship, and false opinions, have all had their distinguished votaries. So the greatest men of antiquity have officiated in solemn devotion at the shrine of idols, some with hoofs and some with horns. So the ministers of the Gospel long worshipped in the temples and vestments of the heathens. So the dialectics of the Stagyrte still govern some Christian churches. Shall we then elevate our thoughts to the dignity of our own independent condition, and act accordingly, or shall we resemble slaves or male-

* 2 Hale, Pl. Cr. 290. : and his convictions of supposed witches at Bury St. Edmonds, in 1664.

factors recently escaped from justice, and still dragging at their heels the fragments of their broken chains.

Let us keep in mind, that we too must become ancestors and be judged by posterity. We cannot altogether foresee what may be said of us, but part we may imagine. These people, (it may be said,) long after they had set the great example of self-government upon principles of perfect equality, had reduced the practice of religion to its purest principles, executed mighty works, and acquired renown in arts and arms, had still one pagan idol to which they daily offered up much smoky incense. They called it by the mystical and cabilistic name of Common Law. A mysterious essence. Like the Dalai Lama, not to be seen or visited in open day; of most indefinite antiquity; sometimes in the decrepitude of age, and sometimes in the bloom of infancy, yet still the same that was, and was to be, and evermore to sit cross-legged and motionless upon its antique altar, for no use or purpose, but to be praised and worshipped by ignorant and superstitious votaries. Its attributes were all negative, its properties all enigmatical, and its name a metaphor. Taken in many senses, it had truly none. It was oral tradition opposed to written law; it was written

law, but presuming the writing lost; it was that of whose origin there was no record or memory, but of which the evidence was both in books and records. It was opposed to statute law, to civil law, to ecclesiastical law, to military law, to maritime and mercantile law, to the law of nations; but most frequently contrasted with equity itself. It was common sense, but of an artificial kind, such as is not the sense of any common man; it was the perfection of reason, but that meant artificial reason. And as to its growth and progress, there is as little agreement amongst its panygerists at this hour. Some tell us it was perfect in its inception, and became corrupt through time; others that it had a barbarous origin, but gradually grew to perfection. Some that it was anciently wise, and then grew foolish, and from thence has been in a state of convalescence. One speaks of it in his day, as being the perfection of human reason; another shows it to have been at that very period under a dark and fearful inumbration. With false theories it must ever be so; for there is but one thing uniform, and that is truth, one thing wise, and that is simplicity.

We have seen the historical plan with which Sir William Blackstone sets out in his first volume, let us now see how he winds up in his fourth and last.

“I have endeavoured,” says he, “to delineate some rude outlines of a plan for the history of our laws and liberties, from their first rise and gradual progress among our British and Saxon ancestors, till their total eclipse at the Norman conquest, from which they have gradually emerged. Our religious liberties were not established till the reformation, our civil and political liberties were not thoroughly regained till the restoration of King Charles, nor fully and explicitly acknowledged till the era of the happy revolution.”*

Here then we find the laws and liberties of our sky-blue British ancestors, of our ancestors the Picts and Scots, which, being interpreted, means robbers and rovers, of Jutes and Angles, and Saxon princes, and Scandinavian sea kings, and such other barbarians as successively invaded, plundered, exterminated, or enslaved each other in the long ages of night and darkness, eclipsed by a body still more opaque—the *Norman jurisprudence*;—a fearful and ominous occultation! Five centuries our civil and religious liberties remained in total darkness; in another half century a few digits of our political liberties had emerged, but the eclipse was not fairly

* 4 Comm. 42.

over for more than six hundred years! Who that had a choice, would remain in a planet or a sphere where such phenomena might be repeated? And, considering that the reformation was not owing to any virtue of the common law, but to the passions of a murderous king seeking to destroy his wife, gratify his lust, and bastardize his lawful issue; that the restoration of King Charles was preceded by the decapitation of his father, and by long and bloody civil wars; and that the happy revolution was the dethroning of a father by his son-in-law, and a bloody civil war, it must be allowed that the going off of this eclipse was little less portentous than its coming on. Yet mark how the eloquent commentator, after thus bringing us through six centuries of bondage and darkness, concludes: "Of this constitution, so wisely contrived, so strongly raised, and so highly finished, it is impossible to speak with that praise which is so justly and severely its due; but to sustain, to repair, to beautify this noble pile is a charge entrusted principally to the nobility, and such gentlemen as are delegated by their country to parliament!" Now, let the pile be as beautiful and noble as it may, as we have no nobility, and our legislative representatives are to obey and not to judge of our constitution, this may serve as one among many reasons, why we should cease to deal in maxims that have no application to

our affairs: why, being of full growth and stature, we should no longer go in leading strings, but manfully take upon us the burthen of our own concerns: and why we should not do as the foolish fowls who, after the period of incubation is complete, and the law of their nature protrudes them from the egg, still carry the shell upon their backs.

Let us now take a rapid view of the antiquities of the common law, as delivered to us by writers, to whom we have so long submitted with almost stupid veneration, that we know not how to contradict them. Sir Edward Coke says,* “ the first king of the land was King Brutus, who, as soon as he settled himself in his kingdom, for the safe and peaceable government of his people, wrote a book in the Greek tongue, calling it *The Laws of the Britons*; and that he collected the same out of the laws of the Trojans. This king died after the creation of the world 2860 years, and before the incarnation of Christ 1103 years, Samuel being then judge of Israel: and that the laws of the ancient Britons, their contracts, and other instruments, and the records and other juridical proceedings of their judges, were wrought and sentenced in the Greek tongue; it is plain and evident,” he says, “ by proofs luculent and uncontrollable.” This tale is

* 3d Rep. Pref.

borrowed from Geoffrey of Monmouth, the greatest fabulist of all the monkish chroniclers. According to him, this Brutus was the great grandson of Æneas, by his son Ascanius, but having accidentally killed his father Sylvius with an arrow, he was forced to leave Italy, and flying into Greece, he joined the Trojans who had settled in that country after the destruction of their city. There he married the daughter of King Pandrossus, who gave him a fleet with which he entered the Atlantic sea, performed wonders in Gaul, drove King Goffarius from his kingdom, put to sea again, landed at Totness in Devonshire, found the country peopled with giants, whose king was Gog Magog, slew these, divided the land among his people, and from his own name called it Britannia, and the seat of his government *Troja Nova*, afterward Tribonantium. He had three sons; to his eldest, Locrinus, he bequeathed England, then called from him Leogria; to his second son Camber, he bequeathed Wales, called from him Cambria, or Wales; to his third son Albinactus, he left Albania, at this day called Scotland.

From this flimsy evidence, and an expression imputed to Cesar,* which the best critics and antiqua-

* De Bello Gallico, apud Godvinum, l. 6. c. 13. Janus Anglorum, c. 9. Reliquiæ Spelmannianæ, p. 98, *et seq.* Epinomis, c. 2.

rians suppose to be interpolated into his text, touching the Druids using *Greek* letters, and some far-fetched Greek etymons, too tedious to be repeated here, my lord Coke determines this positively, that the common law was all in Greek; although the Druids using Greek letters, no more proved that the ancient Britons pleaded in Greek, than our almanacs being printed in Roman characters, proves that their compilers speak Latin. But, quitting these learned futilities, and this barren erudition, let us begin where true history begins, with Julius Cesar; whose writings are (in the words of Coke himself,) as true, as his style and phrase is perfect.

The most civilized of our British ancestors, according to him, were little different from the Gauls.* The more inland were very barbarous, raised no corn, lived on milk and game, and had no clothing. Those of the southern coast, only covered their nakedness with skins of wild beasts, thrown carelessly over them, to avoid offence to strangers who came to trade with them.† They all painted their bodies with woad, to add to the horror of their looks. Ten or

* De Bel. Gal. l. 5. c. 14. Seld. Epinomis, c. 2. s. 6. Diod. Sic. l. 4. Herodian, l. 11.

† Univ. Hist. vol. xiii. p. 230.

twelve had wives in common, brothers with brothers, and fathers with children; and the children that were born were imputed to those who first knew the virgin. Their towns were a few scattered huts in the woods, defended by slight ramparts of earth or logs. All the later Roman historians confirm these accounts of the barbarous condition of our first legal ancestors; and Tacitus says, that their divisions were very advantageous to the Romans, and the chief means whereby they were conquered,* according to the ancient practice of the Romans, to make kings the instruments of subjection and servitude. The best lesson of Common Law we can derive from these ancestors, is to avoid that fault of their's, to shun their example, and to let no enemy ever take advantage of our disunion.

They had abundance of gods and goddesses.† Their thunderer was Taran, and their goddess of Victory, to whom they sacrificed their prisoners, was Andate. Their priests, the Druids, were absolute over their consciences, and exacted their dues by terrible excommunications.‡ They had Druidesses also, of different orders.§ Some like nuns made

* Vita Agricolaë, c. 14. † Univ. Hist. Vol. xviii. b. 4. ch. 14. p. 233.

‡ Toland's Hist. of the Druids, p. 71, 72. Cesar, De Bel. Gal. l. 6. c. 13.

§ Tacit. Annal, l. 14. Mela, l. 3. c. 2. Cesar, De Bel. Gal. l. 1, c. 27.

vows of virginity, and lived in sisterhoods sequestered from the world. They addicted themselves to miracles and prophecies, were consulted upon all important occasions, and almost worshipped as divinities. It was one of these sybils that foretold to Dioclesian, then a private soldier, that he would one day be an emperor.* They raised tempests by their incantations, transformed themselves into animals of all kinds, and cured the most inveterate diseases.† Like the Magi, the Gymnosophists, and all other such impostors, they had two systems; one for the initiated, who were sworn to secrecy, which they taught in the deep recesses of woods and caverns, but never committed to writing: the other they used in public, to astonish and bewilder the ignorant, and add to the power and riches of their priesthood.‡ Like the priests of Egypt, the Chaldeans, or Brahmins, they had a farrago of enigmatical common law verses, which they delivered to the multitude from little eminences, and inspired into them a fanaticism, that sometimes stood in the place of a more enlightened patriotism, and made them formidable to the all-conquering Romans. The oak was sacred amongst them, and the gathering of the mistletoe

* Univ. Hist. Vol. xviii. b. 4. c. 13. p. 234.

† Mela, lib. 3. cap. 2-

‡ Mela, l. 3. c. 2. Lucan, l. 1.

was one of their most imposing mysteries: an ancient truncated tree of this species, stood for the emblem of their Jupiter, and their bloody and awful sacrifices were performed beneath the thickest shades of their spreading foliage. Lucan gives the following poetical description of the groves they frequented for these cruel practices:

Lucus erat, longo nunquam violatus ab ævo,
Obscurum augens connexis aera ramis,
Et gelidas alte submotis solibus umbras,
Hunc non ruricolæ Panes nemorumque potentes
Silvani nymphæ quæ tenent sed barbara ritu
Sacra deum structæ diris altaribus aræ,
Omnis et humanis lustrata cruoribus arbor, &c.

LUCAN, *Phars.* l. 3. v. 399.

It required twenty years to study their rubric, and get all their mystic rhymes by heart;* the same time that is required for a modern judge to read his books,—

Viginti annorum lucubrations.

The difference is that the one had the *carmina necessaria* in his head, the other on his shelves. One of their favourite modes of divination, was slicing a man in two by the diaphragm, and from his fall, convulsions, and bleeding, to predict events, and dis-

* Cesar, *De Bel. Gal.* l. 6. c. 13.

cover the will of the gods.* They worshipped also many symbolical objects of nature.†

The most cruel of all their rituals was burning in colossal effigies of basket work, in human shape, dozens of living men together, with hay or straw.‡ But so many of these Druids themselves were burned in the isle of Anglesea by Paulinus, in the time of Nero, in the fires they had kindled for their Roman prisoners, and so many were destroyed soon after, in the great revolt under Queen Boadicea, that their power declined, never to rise again. Such as would not submit to build temples and worship the gods of the Romans, fled to Ireland, Armorica, Caledonia, and the smaller islands; and we hear no more of them. What part of our common law do we then derive from these our British ancestors?

The next era is that of the Romans. If any rules of their law were left in the days of Papinian, they have disappeared with the cities, palaces, theatres, roads, ramparts, and other great works of that mighty people. But Gildas,§ one of the earliest Saxon writers, who flourished in the sixth century, declares

* Diod. Sicul. l. 5. c. 35. † Lucan, Phars. l. 3. v. 399, & 412.

‡ Cesar, De Bel. Gal. l. 6. c. 16. § Univ. Hist. vol. xviii. p. 259.

that he could find no British record of any of the civil or ecclesiastical affairs of Britain whilst subject to the power of the Romans ; and that, if any such existed, they had been either destroyed by their enemies, or carried into foreign parts by some of the exiled Britons. That the Romans did so embellish and improve the southern part of Britain, as to make it an important province, is certain ; but what their mode of administering the government and laws may have been, no records remaining, must be looked for in general history. What portion of their laws they imparted to their provinces, what to their *municipia*, what to their colonies, will be matter of curious research.* The arts of corruption and disunion they did practice on them, as Tacitus expressly admits : but that they should allow them to participate in any thing that would be consistent with patriotism or independence, we cannot well believe. Whoever made a brave resistance was condemned to chains and slavery, and to grace the brutal and inhuman triumph of his conqueror.† Those who submitted, like cowards, or betrayed, like sycophants, were rewarded with the estate or petty kingdom of the betrayed, or with mock honours, which lasted as long as he was

* Montesq. Esp. L. l. 11. c. 19. † Plut. v. iv. p. 271. Kennet's Antiq. p. 218. Rollin's An. Hist. p. 165. Adam's Rom. Antiq. p. 389.

useful.* The Romans were, in every stage of their existence, a cruel and pitiless race ; and more likely to encourage the vices of slaves than the virtues of freemen amongst a people, who had once fiercely resisted them, and whom they had found it impossible, but for their vices, to subdue. Tacitus says there were no legions so innocent of the tumults of the civil wars as those in Britain, because they were taught, by so many expeditions, to hate the enemy.† The Britons were not suffered to bear arms within their own country, but the youth were drafted into cohorts, to serve in subjecting other provinces. How little of civil or military virtue was left among them, how little they were used to the exercise of their faculties, or to any rule of conduct whatever, appears by this, that, even with the wall built for their protection, they could not defend themselves against the unsubdued barbarians, their northern neighbours, but basely implored the protection of other barbarians, who, despising their meanness, treated them as a nation self-condemned to slavery.

If Papinian sat in judgment in Britain, it must have been in the Roman colonies, and between Roman citizens, and in those times when the Roman

* Tacitus Vita Agricolæ, c. 14.

† Tacitus Hist. lib. i. c. 9.

law was like our own at this day, as it appears from Blackstone's quotations from Livy,* an immense mountain, pile upon pile, and computed to be a loading for many camels. It had then received no ray of that light which since has shone upon it, and upon us, nor been digested into order; and its only religious sanction was the fear of gods, who were themselves the types of every human vice. Some Roman citizens in those days possessed many thousands of slaves, liable to be scourged, tortured, and crucified, at the will of every brutal master;† and to put these wretches to the torture, without any charge, was the common course of administration, whenever it was hoped that any thing could be wrung from their agonies, that might be desired for good or evil ends. Nor did the Romans promote either commerce or civilization among the conquered nations, but left them in a state of lethargy, the powers of their native genius extinguished and degraded, much below the savage state in which they found them.

It is uncertain at what precise time Christianity was first preached in Britain. Some would have it as early as the primitive apostolic age. Gildas, on

* 1 Comm. p. 81.

† Adams' Rom. Antiq. p. 37, 274.

traditional evidence, refers it to as early a date as the great revolt of Boadicea.* It is not certain whether it had prevailed, or to what extent, among the legions, prior to their recall. The earliest converts, (I mention it to the honour of the fair sex,) appear to have been females, as they were the first and most effective instruments of conversion. Pomponia Græcina, an illustrious Roman lady, wife of Aulus Plautius, the first governor of the province, was accused of strange superstitions; and her husband, according to usage, became her judge. He tried her in presence of all her family, and acquitted her; but, it is said, she ever after led a life of melancholy. The relation of this, by Tacitus,† and the manner in which he, and the other writers of those times, speak of Christianity, make it very probable it was that which she had embraced; and, from the necessity of concealing it as a crime, she must have suffered inward and living martyrdom. There is good reason to believe, that another lady of British birth, highly celebrated at Rome, for her great beauty, was among the converts of Saint Paul. In writing to Timothy, he says, Eubulus greeteth thee, and Pudens, and Linus, and Claudia. And Martial, in two different epigrams, compliments this British

* Gildæ Hist. c. 6.

† Annal. lib. xiii. c. 22.

Claudia, then newly married to his friend Pudens, and asks, how it could be, that this Claudia, sprung from the yellow-haired Britons, should have such grace, such beauty, and such form, that the Italian fair might make her their boast, and the Athenian matrons claim her as their sister.

Claudia meo nupsit peregrina Pudenti
Macte esto tædis O hymenæe tuis.

L. iv. Epigr. 13.

Claudia ceruleis cum sit Rufina Brittannis
Edita, cur latine pectora gentis habet
Quale decus formæ, Romanam credere matres
Italides possunt, Attides esse suam.

L. xi. Epigr. 54.

And afterward, in the conversion of the Saxons, Birtha, daughter of Cherebert, king of France, who married Ethelbert, king of Kent, overcame the prejudices of that prince and his subjects against Christianity.*

I pass over the ridiculous stories of Nennius, and Geoffrey, and others, about King Lucius and King Coilus, and Bishops Faganus and Divanus, which are crafty, but dull fictions, and only show how soon

* Bed. Hist. Eccles. lib. i. c. 15.

the pagan ostentations encroached upon the simplicity of apostolic manners. How easy the transition was, from a flamen to a bishop; from the *laniger apex* to the mitre, and from the *toga prætexta* to the pontifical purple; and how much the kingdom of these pious chroniclers was of this world.

The probability is, that the Christian church remained peaceful and united while exposed to violence, and till after the Dioclesian persecution. But when, under Constantine the Great, they began to taste of royal favour, wealth, security, and power, they affected pomp, and knowing no other ceremonies, adopted those of the pagans, substituting pictures of canonized saints and martyrs, for the pagan images of deified heroes. A new superstition also had arisen, that of long pilgrimages to Jerusalem, and other places; and a new order of ecclesiastics, which had its origin in Egypt, the prolific soil of superstition, who began by professing poverty, and arrived at prodigious wealth. And our British ancestors instead of uniting in brotherly and peaceful worship of the one true God, and following the precepts and example of Christ and his apostles, were engaged in the midst of carnage, desolation, and famine, in disputing whether Adam was mortal, and whether children were, born as pure as he was

created, and whether souls were saved by free-will or by grace, when our Saxon ancestors, "*our own Saxon princes,*" who cared as little for the orthodox as the schismatic, took possession of their country, overturned their altars, pillaged their churches and convents, where treasures were amassed, put their clergy to death with as little remorse as the Romans had formerly done the Druids, banished or exterminated all whom they did not retain for slaves, changed the name of their country,* scarcely leaving one town to be called as they named it, or one British word to creep into their language, until the name of Briton or Gael, became synonymous with that of slave. And this brings us to the Saxon era of our common law.

Our Saxon ancestors were at this time, fierce pirates, and the wealth accumulated in convents and churches, was a very tempting prey. Their religion was much more gross than that of the Germans, as generally described by Tacitus : for instead of one God too great to be imaged or immured within walls, they had many, both gods and goddesses. The principal was Odin and his family, composed of his lady Freya, their sons and their eleven daughters : and

* Reliquiæ Spelmannianæ, p. 100.

their theology consisted, in giving to each of these their precise and peculiar attributes and due ceremonial worship. To Odin they sacrificed fat hogs, to Thor oxen and horses, sprinkling the blood on the assembly; and from the entrails they discovered the will and pleasure of their gods. Some of the flesh was burned on altars, the remainder fed the priests, who were much inferior to the Druids in their poetry, much less devout and musical, and much less honoured. They sometimes quarrelled and mutinied against their gods, and shot up arrows at them, if not to wound them, at least to show how little pirates feared them. The first-born and bravest son of Odin was Thor. He launched the thunder, pointed the meteors, and governed the lightning. He had five hundred and forty aerial halls.* They had also their Pantheon of deified heroes, orators, and poets; a door-keeper of the gods, and a grand keeper of the rainbow.† Their heaven was called Valhalla, where their heroes were to spend their time in martial sports, feed on the boar's scrimmer, and swill plentifully of beer and mead, out of the skulls of those they had slain.‡ They had old women who consulted with the dead, and with familiar spirits,

* Edda, fable 11.

† Mallet, *Introd.* c. 6.

‡ Keysler, *Antiq. septent.* p. 117.

whom they believed, and revered as divinities. Odin's image wore a crown and drawn sword, Freya's was an hermaphrodite, with a bow in one hand and a sword in the other. The following song of king Lodbrog, translated out of the Edda, by Bartholine, gives a good picture of the religious sentiments and manners of these ancestors.*

*Pugnaximus ensibus
Hoc ridere me facit semper
Quod Balderi (Odin) patris scamna
Parata scio in aula
Bibemus cerevisiam brevi
Ex concavis crateribus craniorum
Non gemit vir fortis contra mortem
Magni fici in Odini domibus
Non venio desperabundis
Verbis ad Odini aulam.*

* * * * *

*Fuit animus finire
Invitant me deæ
Quas ex Othini aula
Othinus mihi misit
Lætus cerevisiam cum Asis
In summa sede bibam
Vitæ elapsæ sunt horæ
Ridens moriar.*

Christianity however by degrees obtained amongst them, and notwithstanding its corrupted condition, tended to civilize and soften them. Several of their kings became converts, and their subjects followed their example, though they often relapsed, and were

* Univ. Hist. vol. xviii. p. 183.

generally engaged in quarrels and petty warfare. The first written laws, however, were by the first Christian kings. But so deeply was their ancient superstition rooted in their nature, that we find in the seventh and eighth, and even in the tenth century, in the laws of Canute, prohibitions of the worship of stocks and stones, and rivers and hills, and other objects of nature.* The union of the Heptarchy, about ninety years after the coming of Saint Austin, by delivering the clergy from conflicting authorities, might have still more extended their influence and promoted learning, which, such as it was, remained entirely in their hands. Books had become necessary for the clergy, and schools were established for the sons and dependants of the rich converts. But a new set of pirates, more fierce and cruel than our Saxon ancestors themselves, even at their first arrival, landed upon their shores, and put an end to further improvement.

The state of the Christian church, at this time, was very unfavourable to national defence. The monasteries had become agreeable scenes of expiation to wealthy sinners, who flocked to them, and there ended their days in idleness and ignoble indulgences. There was little commerce, except that of

* Lambert, Archionomia. p. 108. 5.

slaves, and the gainful traffic in relics, without the protection of which no person was safe from the devil, no church was holy, and no house secure: miracles were propagated, and believed, and treasures of the kingdom wasted in offerings and pilgrimages. The road to Rome was the high road to heaven; and to such a pitch was this infatuation carried, that we find Boniface, archbishop of Mentz, writing to Cuthbert, archbishop of Canterbury, that the nuns, and other good ladies of England, were debauched before their return, and remained prostitutes in the cities of France and Italy.* The corpse of a saint was the fortune of a convent; and the monks of Saint Augustin came to open warfare with the canons of Christ's church, in Canterbury, for the dead bodies of their archbishops.† Patriotism and military discipline were lost in these cloistered affairs, when the Scandinavian pirates, who had long, under their sea kings, triumphed in every European sea, and made the proudest nations tremble, marked our Saxon ancestors for their prey: and this brings us to the Scandinavian era.

The description given of these invaders, is appalling. They had no fear of any death but a peaceful one. To die a natural death, was to be for ever

* Spelm. Concil. t. 1. p. 237. † Godwin de præsul. Aug. p. 65.

excluded from the halls of the gods of fire and slaughter. They therefore laughed, on receiving a mortal wound, and were congratulated by friends, on the feasting, fighting, and carousing they were going to partake of, where their heavenly joys would be measured by the numbers they had killed.* The victories of the Danes were bloody in the extreme; they refused quarter even to those who entreated to become their slaves; and their insolence to the Saxons, who were of the same original, was extraordinary. They obliged them, when they met a Dane, to bow down their bodies till he passed; and if a Saxon dared to drink in the presence of a Dane, he was punished with instant death, unless the Dane had pledged his honour to spare him;† from whence the phrase, “I pledge you,” yet used amongst drinkers. Desolation followed their steps; old men had their throats cut; children were tossed on spears; and the bodies of matrons and virgins were first defiled, and afterward mangled.‡ The poor native slave, the Briton, saw this vengeance on his conquerors, but was himself only more and more enslaved, and exposed to still greater sufferings. In short, so great was the horror they inspired among

* Northern Antiq. t. 1. c. 6. † Pantopidan Gesta et vestigia Dan. t. 2. p. 139, 209. ‡ Anglia Sacra, t. 2. p. 135. Bartholini, l. 2. c. 9. p. 457.

the Christians, that this new prayer was added to the Litany, *A furore Danorum libera nos Domine.*

Thus, through the lapse of long ages, it is not till the time of Alfred, that we find any thing worthy of imitation; and therefore the virtues of this favourite child of the historic muse shine out, "like good deeds on a wicked world." The miracles related of his adventures and achievements, his courage and fortitude in prosperity and adversity, his skill and success in war and government, the many battles he fought, the many sciences he excelled in, and the many books he wrote, although he knew no letter at the age of twelve, and only began the sciences at forty, and could find no man south of the Thames with learning enough to go through the decrees of the chancery, would make us doubt, if he could be a being of our own imperfect nature. But it is fair to deduct something for the exaggerations of his historians, since they are the same that ascribe virtues and qualities to Saint Dunstan, and other favourites, and relate miracles of them, such as no man, who has any reason left, will at this day give credit to, and has made some to consider this heroic personage as the Hercules, to whom ignorance was wont to ascribe all wonderful achievements, real or imagined, of elder time, which it could not otherwise account for.

Alfred is said to have been the founder of that constitution, which Blackstone says had remained one thousand years unchanged ; and to have rebuilt it out of the old discordant materials which he found piled upon each other, in rude and vast irregularity. If this be so, his example is well worthy of our imitation at this day, considering what piles of discordant materials we have to dispose of.

He reduced the whole kingdom, 'says Blackstone, into one regular and gradual subordination, wherein each man was answerable to his own immediate superior for his conduct, and that of his neighbours.

Now, this might have been a good plan of police, to keep an unruly and marauding race from doing mischief, and to pen them up like cattle ; but utterly inconsistent with any advanced state of civilization. What could be the liberty of a people who were all like prisoners in the hands of manucaptors ? What the commerce of those, who could not leave their hundred to go to fair or market, or buy or sell without the permission of the borseholder ? Or what the security of men not only amenable for their own sins, but for those of their neighbours ? Nor was the subdivision into tithings and hundreds the invention of Alfred ; it was a kind of military police used in many

ancient nations; it was the division of the army of Cyrus, if we are to believe Xenophon; it resembled the centuria of the early Romans; it was used among the Gothic or Teutonic people; it was too obvious to be ranked as a discovery, and too inconvenient to outlive the age for which it was instituted: and when Blackstone wrote, the word tithing was almost obsolete, and little of the hundred remained in practical use. Neither the one nor the other was known on this side of the great water that unites us with Europe in our commerce, while it separates us for ever in our government. These specious phrases therefore are deceitful, and we might as well be told that the hut built by Robinson Crusoe out of the materials of his shipwreck, endured beyond the time of their natural decay, as that the constitutions of Alfred remained a thousand years unchanged. That Alfred divided the kingdom into counties, is more than questionable. Sir Henry Spelman says, that the Saxons though divided into many kingdoms, were all united in their laws; and that by the union of the heptarchy as under Alfred, Ethelstan, &c. no notable change was wrought.* And truly there is nothing in the text of Alfred's laws to distinguish them from the Dane-lage, Mercian-lage, or any of the other codes of the

* Reliquiæ Spelmanianæ, p. 49.

Anglo-Saxon or Danish princes ; or those of the Burgundians, Lombards, or Visigoths, or the old capitularies of France, which are all of the same original type.*

As all crimes and offences were atoneable by compensation and fine, and as these fines were a principal source of revenue, the chief object of the temporal laws was to regulate them. The refinement of the laws of property, separated from fact, was unknown to them ; their commerce and civilization had not advanced so far. Their laws, except what regarded church dues, penance, and other ecclesiastical ordinances of synods or councils, which always stood foremost, were but tariffs, in which we may learn how much it cost to kill a man, of any given rank, from a monarch to a slave ; what a live virgin cost, and what a widow ;† how much for cutting off one or two ears of a bishop ; how much for the ears of a churl ; what the boring of one or both of the membranes of the nose of a person of any given rank ; how many scætas for a certain joint of the thumb, or the same of the ring-finger ; how, when the great toe-nail cost two shillings, the others were but a shilling a piece ; how much for lying with the king's

* Vide Lambard's *Archionomia*, *passim*.

† Wilkin's *Leges Anglo-Sax.* p. 1—7.

grinding-maid, and how much with his victualling-maid, and how much for a yeoman's cup-bearer; how a rich sinner might discharge the penance of a seven years' fast, without losing one dinner, by making his dependants fast it out at the rate of three days each.* And the laws of the great Alfred are nothing better than the rest of these semi-barbarous codes, as may be seen by comparing their texts.† They are chiefly distinguished by a long preface, borrowed with great freedom from Exodus and the Acts of the Apostles; the second commandment being left out of the decalogue, as well as the injunction touching neighbour's wives: the first omission, to comply with the liturgy of the day, but what objection the king had to the second inhibition history does not say. To make up ten commandments this precept is inserted at the end, "Thou shalt not make gold or silver gods." Being so amended, it reads thus, "Thou shalt bow down and worship images, if they be not of gold or silver!"

There is however instruction, as well as curiosity, in these ancient codes. The laws of a country throw light upon its civil history, and can only be perfectly understood with reference to it. Nor can the laws be understood so well, as by the state of manners

* *Canones datæ sub Edgardo Rege, Archionomia*, p. 37.

† *Leges Aluredi*, ib. p. 15.

at the time of their establishment or growth. There might be some wisdom in those disordered times, in quieting deadly feuds or bloody vengeance by compensation to the injured party or his family; and good policy in making offenders and offences the instruments and means of revenue: but when such jurisprudence is glorified with false praise, and we are at this day exhorted to restore it to its "*pristine vigour*," it is time to put an end to such delusive cant, together with all other fictions or falsehoods that disgrace our law, and give to that which should be all faith, all purity, all truth, the character of juggling and imposture.

The trial by jury is also referred to the Saxon jurisprudence, but upon no satisfactory evidence. It is in vain to look for it in their canonical purgations, nor in the compurgation by twelve oaths,* since that number was not more connected with trial by jury, than with many other ecclesiastical ceremonies; and the oaths of compurgators were not confined to twelve, but sometimes were of smaller number, and sometimes multiplied to hundreds on each side. Spelman tells of a Pope (Leo†) who had twelve bishops as his compurgators, yet he was not surely on his trial by jury. The same apostolical number was

* Spelman. Gloss. in voce Jurata.

† Ibid.

used in the ordeal by red-hot plough-shares, for the array of those terrible ministers of justice* This last, with the choke-bit, the boiling water, cold water, and the ordeals by the cross, and by red-hot balls, were the trials most in use amongst our Saxon ancestors, and not the trial by jury, of which none of their laws make the slightest mention.

As to the great Alfred, whose name is justly held in honour, though his exploits may be exaggerated, whatever his genius had effected for his country seems too soon to have been lost. On his death the Danes renewed the work of slaughter and destruction, till Canute became monarch of all England; and, having embraced Christianity, made amends for his past cruelties by a politic and a merciful reign. The state of morals, even in his time, may be judged of from his code, and in particular from certain provisions against the worship of wood and stone, and waters and ruins, and other such paganish and idolatrous worship.† And here again, the respite from disorder was but short. New struggles for the crown, such as have in every century afflicted England, continued till the restoration of the Saxon line, in the person of Edward the Confessor.

* Spelman. Gloss. voce Ordalium, &c. Ducange Gloss. in voce *Judicium Dei*.

† Lamb *Archæologia*. p. 108—5.

And, most assuredly, whether we look to the code which bears his sainted name, or to his individual story, we can find little to justify any violent predilections for the one or the other. Those laws indeed, which are at best a very meagre production, are said to have been first composed, as well as his will, after he was in his grave, by his politic successor. As to his personal merits, he was so corrupt that he avowed his taking bribes for his judgments or awards :* he robbed his mother of her estates :† he was so great a coward,‡ that he would have fled back to Normandy from the Danes, had not the most powerful and most wicked of his subjects, Earl Godwin, taken him under his protection, and married him to his daughter. Having thus got a young and beautiful wife, he made a superstitious vow of chastity, which gained him the title of a saint or confessor.§ From this barren marriage grew all these bloody contentions for the succession between those that were of blood royal and those that were not; which exposed the nation to the most humiliating subjection, and brought upon it that Norman jurisprudence so justly reprobated by Blackstone, and which I shall not attempt to vindi-

* Hist. Ransiens, c. 114.

† Anglia Sacra, vol. i. p. 236.

‡ Wm. Malms. l. 2. c. 13.

§ Ingulf. Hist. Wm. Malms. l. 2. c. 44. Anglia Sacra, vol. i. p. 147.

cate. Such was that saint, and such those laws so often made the boastful theme of our blind guides in history; for the revival and restitution, and confirmation whereof there has been so much bickering, bartering, and chartering: and this brings us to the Norman era.


Odious as were the Norman kings; at times trampling on the necks of their subjects, and then again stooping their own beneath the foot of the minion of a foreign hierarch: engaged from the beginning in fraternal wars and parricidal attempts, yet still their dominion was more favourable to general emancipation than that which preceded it; because their interest led them to break the power of the nobles, who, proud of their vassals, their slaves, and their embattled castles, bearded their kings in their palaces, and defied their power. But those haughty barons, who figured so proudly at Merton, or at Runnymede, little thought of loosening one rivet in the long chain of graduated dependence and subjection, except in that one link that bound themselves to their superior. It was, on the contrary, one of their griefs, that the kings, in granting privileges to towns and boroughs, in favour of commerce, were setting slaves at liberty, to raise a counterpoise against their power. It is true, that out of these

hard collisions, between mutiny and despotism, some sparks of future liberty were then elicited, to which England may afterwards have owed her superiority over so many rival nations, and we ours, at this day, over all others. With respect to the "*liberties*" of our Saxon ancestors, it is all delusion. The great majority of them were, in the most abject slavery, bought and sold like cattle, and paid for, when put to death, by compensation to their master.* The slave trade was carried on with a degree of profligacy that would not bear to be told, so shocking is it to decency. The provisions in the Saxon laws, in favour of Christian slaves, as that the purchasers of a Christian, should manumit him at the end of seven years;† that Christians should not be sold to Pagans, beyond the seas: and others, which the spirit of Christianity had promoted, show what their condition was; as do the provisions, settling the duties or toll to be paid upon the sale of each man in certain market towns.‡ What the proportion of our enslaved, to that of our free ancestors was, it may be difficult to say with precision. Some of the Romans were possessed of many thousands of slaves; but, supposing that in England they were but three to


* *Anglia Sacra*, t. 2. p. 258. *Murat. Antiq.* t. 2. p. 885 *Wm. Malms.* l. 1. c. 3. † *Lamb Archaionom.* p. 15. § 11. ‡ *Scriptor. Sax.* a T. Gale ed. l. 1. p. 763.

one, which is a moderate computation, wherever agriculture and the arts are committed to bondsmen, and their masters only fight and get drunk, then this will follow, that when a popular orator here declaims to a jury or other assembly, composed of Dutchmen mixed with Israelites and various Gentiles, about the laws and liberties of their Saxon ancestors, probably he is twice mistaken; first, in supposing their ancestors to have been Saxon; and, secondly, in supposing his own to have been freemen: when the chances are clearly three to one, that they were some poor Gurths, perhaps of British race, the lineal inheritors of the British soil, but whose armorial bearings were no nobler than a dog collar, with no prouder motto than the legend of their thralldom and their master's name: such things, in fact, as might be played for with dice, or pledged at the alehouse for beer. And it was during that long *eclipse* of liberty, as it is called, that slavery wore out, and just about the time when it is supposed to have emerged, and the Saxon jurisprudence was returning to its *pristine vigour*, that a new slave trade arose, and a new race was devoted to its inhuman and ungodly exercise; and so little did our Saxon ancestors know of the dignity of human liberty, that they sold their own children, and sometimes their own persons, to slavery.

It was my intention here to have pointed out some of the most curious and interesting subjects, connected with the history of our law, but time will not permit. They will present themselves readily to the historian who shall devote his labours to the useful and honourable task of exploring, with a view to future improvement, the true foundations of our law. And let none be deterred, by the supposed dryness of the subject. The historic muse is not austere, except when dulness woos her; invoked by genius, she gives to the coldest subjects warmth and animation. And as the geographical historian is not content to determine the depth of the valley, or the height of the mountain, but enriches his works with moral instruction, by the history of the human beings who lived and roved, and worshipped and fought, and flourished and fell, by the mountain's side, upon the verdant plain, by the river's bank, or the wide ocean wave: so the historian of our law, derived as it is from such an ancient and a distant source, will find his subject abounding in those changeful events, metamorphoses and transitions, which will impart to real and most important history, all the high charms of poetry and fiction. Whilst fancy roams at large, through time and space, and "distance lends enchantment to the view," reason will knit the chain that binds effect with cause, and judgment will ap-



prove the generous design. This discourse is but a short prelude, to challenge into the noblest field of exertion the talent and genius of our country, much of which is now lost in barren erudition. If the hundredth part of that painful industry and acknowledged talent, which is wasted upon vain and ever baffled efforts to reconcile the irregularities, explain the anomalies, sustain the paradoxes, and solve the riddles of our entangled jurisprudence, was bestowed upon a science capable of improvement or advancement, what glorious fruits would it not, e'er now, have brought forth, instead of that sickly and exotic growth, that has no sap nor freshness; upon whose withering branches some faint pale blossoms may appear, but rich fruit cannot ripen. We should have had laws suited to our condition and high destinies; and our lawyers would have been the ornaments of our country. No longer forced into the degrading paths of Norman subtleties, nor to copy from models of Saxon barbarity, but taught to resolve every argument into principles of natural reason, universal justice, and present convenience, truth would have been the constant object of their search; chicane and pettifogging would have found no dark crevices to lurk in; bad faith would have been banished from the temple of Justice; good sense would not be shocked with the failures of right, upon exceptions of



idle and unmeaning form; and Justice would not be seen for ever travelling upon by-paths, such as necessity enforces by the sides of a broken road.

And what subject can be at once so important, and so amusing, as to trace our law through all its various and progressive changes, from its first rude origin in the wilds of Gaul and Germany, and its first crossing the salt wave, till after a long sojourn of troubled ages, it again passed the wider expanses of ocean, and arrived at this western continent. Here, "like a tree set by the water side, it will spread its roots towards the moisture, and will not fear the heat when it cometh, for its leaf shall be green, and it will not cease to bring forth its fruit."

To realize this boast, we have but to put our hands to the good work of reformation which cannot be long delayed, and which alone can satisfy the determined will of the people. Having adopted the common law of England so far as it is not repugnant to our constitutions, we have a mighty interest to know clearly what it is, and from what stock it comes. We must either be governed by laws made for us, or made by us. If we do not credit the stories of King Brutus, or King Lucius, or Doctors Faganus or Divanus, or of the Græco-Trojan code, translated

by the great-grandson of Æneas, who after slaying the giants and their King Gog Magog, took possession of Britain, and dying divided it among his three sons: so neither should we believe that we can be governed. at this day, by the oral traditions of semi-savage Saxons who could have no knowledge nor conception of the objects with which our law is conversant. We cannot believe that those vast importations, which come wet from the press, or new bound in calves' skin, treating of bills of exchange, promissory notes, policies of insurance, charter-parties, banks, steamboats, patent-rights, and such learning, can be rationally connected with the oral traditions, or ancient common laws, *of which our Saxon ancestors were so unjustly deprived, by the chicaning and finessing Norman clergy.* /

If this common law is but oral tradition, how comes it to fall about our ears in overwhelming showers of printing? How came these ancestors by traditions touching what they could have neither known nor contemplated? Had they possessed the arts and sciences which time has since brought to light, we might be justified in looking back to their times, their manners, and their usages for instruction. Instead of their judicial astrology, had they known the true theory of the heavenly bodies, so as to interrogate

them with certainty as to their course and position in remote and trackless oceans ; had they understood the virtues of the magnetic needle, and by its guidance to explore all earthly regions, habitable and inhabitable ; had any of their sages commanded the fleeting clouds to discharge their latent fire ; had any of their artists yoked that fierce consuming element to the peaceful car of commerce, or thundering engine of defensive war ; had they, for the cure of diseases, instead of magical incantations, and impious consultations with the dead, discovered the circulation of the blood, the structure of the human frame, and its wonderful and delicate organization, and by accurate experiment been taught to heal, to succour, or to cure ; had they been acquainted with that wonderful instrument, which multiplies intelligence, and renders ancient and foreign learning familiar and vernacular ; had the use of letters, instead of being unknown, or if known, confined to cloisters or to subjects of scholastic and theological disputation, been cultivated and extended to all ranks, and all useful purposes, we might look back to them for wisdom. If, instead of the skin-covered baskets,* in which our Celtic ancestors carried on their trade and navigation, or the barks in which our Saxon and Scandinavian ancestors coasted along in their piratical

* Univ. Hist. v. 18. p. 232,

excursions, their merchant sitting at his desk, by the simple agency of his pen, could have given impulse and direction to ships of mighty magnitude and wonderful construction, rare and curious combinations of art and elegance: preordain what seas they were to traverse, what climes to visit, what ports to enter, what delays to make, when to return, and by what route, with all the thousand details that the refinement of commerce has produced, and the free use of letters can express; then we might derive from them wise laws and ordinances of commercial intercourse. Had their landed possessions been unfettered by feudal rules, and free to circulate for the purposes of peaceful life, and had their personal possessions been any thing more than their cattle and their arms, their modes of contract and conveyance, whether expressed in Greek, in Latin, in Erse, in Danish, in Saxon, in Norman, or in forensic English mixed and compounded of them all, might govern us in that variety of transfers and modifications which refinement in commerce and civilization renders necessary. And time and labour would be better bestowed in searching for such precious antiquities, as models of our legal forms and institutions, than in digging in subterraneous ruins for vases, and torsos, and columns, and sculptured ornaments, wherewith to embellish the arts of luxury and pride.

It is the meagreness and insufficiency of this ancient stock, that has obliged judges to legislate *pro re nata*, upon every new point. It is the complication of these stinted usages with the perverse intricacies of the Norman jurisprudence, that has made decisions less wise than if their authors had been more free to follow the dictates of their own good sense, or less restrained by the antisocial spirit of the common law, from resorting to universal principles, and to codes of approved and written reason. The colonial laws, and the constitution and statutes of the state, have successively pruned the exorbitances and strange peculiarities of the English jurisprudence: and it is therefore that the decisions of our judges, due regard had to their personal merits, stand so far above those which we import. It is for that reason also, that we should import no more; for with every deference due to the learning, wisdom, and integrity of English judges, they are not fit persons to legislate for us. If we are indebted to them for much good learning, it is more becoming to pay them back with interest, than run deeper in their debt. Dependence can never cease if one nation is always to teach, and the other always to learn. Our condition is essentially different from theirs. They are appointed by a king, and he is the fountain of their justice and its administration. Some of them are stationed at

Westminster. and some are supposed to follow this moveable fountain wherever it shall be. Must we too follow? Must we tread always in their steps, go where they go, be what they are, do what they do, and say what they say? Too much of this sympathy may endanger our very being. If we can only be wise when they are wise, we must also be foolish if they are foolish, doat when they doat, and die when they die; and then, if I may borrow for illustration the witty conceit of the author of *Hudibras*, we shall be like him whose nose being made of the porter's brawn, could not outlive the parent substance,

“ And when the date of knock was out,
Off dropped the sympathetic snout.”

In despotic countries the will of the sovereign is the law, and his glory the sole end: earth, air, and sea, are referred to his dominion: time is measured by the years of his reign: and his subjects are quantities to estimate his grandeur. His vices or his virtues, his battles and his sieges, his intrigues, usurpations, and alliances, his pleasures and amours, absorb all other interests; and the servile pen of the historian and the poet, is ever ready to pay divine honours to successful crime. In a free country, triumphs and victories, are only valued as the means

of peace and safety ; and the glory of the hero, is to have fought in the defence of his country's liberty and laws. So thought the ever honoured patriot, who in that farewell address, which breathes the spirit of his wisdom and his virtues, anticipates as the great reward of all his services, to enjoy in the midst of his fellow citizens, the benign influence of good laws, under a free government.*

There is one country then, whose history is yet unstained with crime or usurpation, where the faithful chronicler of its short but bright career, may invoke both liberty and truth to bear him company. Need I name it? No, for before I spoke, the exulting heart of every hearer had already answered, It is ours—it is our own.

It may be asked, Why this censure upon our ancestors and upon their usages, and whether there is any code for which we would exchange our law. I answer: as to our ancestors I hold them all in equal honour, and treat them better than they have done each other. I would not ruffle a feather in the cap of any of them: but it is no disparagement to say, that they were barbarous in times of universal darkness. And as to our laws, it is one thing to change,

* Washington's Farewell Address, *ad finem*.

and another to reform them with a tender, patient, kindly, and experienced hand ; and God forbid they should be touched or meddled with, by any other than the wise and honest.

Our law is justly dear to us—and why? because it is the law of a free people, and has freedom for its end, and under it we live both free and happy. When we go forth, it walks silent and unobtrusive by our side, covering us with its invisible shield from violence and wrong. Beneath our own roof, or by our own fireside, it makes our home our castle. All ages, sexes, and conditions, share its protecting influence. It shadows with its wing the infant's cradle, and with its arm upholds the tottering steps of age. Do the smiles of the babe give gladness to the mother's heart, her joy is perfect in the consciousness that no tyrant's power dare snatch it from her arms; that when she consigns it to repose, its innocent slumbers are guarded by a nation's strength, and that it sleeps more free from danger than kings amidst their armed myrmidons. And when life's close draws near, we feel the cheering certitude, that those we love and leave shall possess the goods that we possessed, and enjoy the same security in which we lived and died. But that we are indebted for this, to Saxon, Scandinavian, Gaul, Greek, or Trojan, is what unsophisti-

ated reason will not endure. We owe the growth of knowledge, and to the struggles of our patriotic patriots, many of whom have bled and died for it: we owe it to fortunate occasion and favouring providence. But even this part of our law which thus secures our rights and liberties, is not untainted with pedantry, nor free from all absurdity. A sister state has already set on foot the experiment of a penal code, and committed its execution to the hands of one of its most capable citizens.* Let us hail the happy augury and prepare for a still nobler effort, which imperious necessity will force upon us, and which cannot and ought not to be long delayed.†

If the experiment had never before been made of a judicial code, substituted in the place of antiquated legends, usages, and customs, we might fear to engage in an untried and hazardous undertaking. If no attempt had ever yet been made; to reduce to a body of written reason, the scattered fragments of a nation's laws or usages, or if when such attempts were made, disorder and mischief had constantly ensued, we might take warning from such examples. If no wise jurists had ever recommended the digest-

* Edward Livingston, Representative in Congress for Louisiana.


† See Cooper's *Justinian*, p. 410.; and *N. Am. Review*, vol. iv. p. 1. &c. an article imputed to the pen of Mr. Wheaton.

and an new ordering of the law, there might be te kindy in the proposal, but Hale and Bacon have n ay approved, but offered their views and plan And are not our own written statutes periodically revised ; why not that part of our laws that rests upon less solid evidence ? It has been the first glory of the greatest sovereigns and the best policy of the wisest people. The most celebrated lawgivers have travelled into all regions where early civilization had left its luminous traces, to gather the chosen flowers and fruits of every clime. If the fathers of our revolution at the peril of much more than life, of all the vengeance that offended power can visit on the unsuccessful patriot, dared to uproot the three great pillars of the Common Law, the monarchy, the hierarchy, and privileged orders, shall we stand in superstitious awe of unlaidd spectres, shall we still be amused by nursery tales, and tremble at the thoughts of innovations upon institutions which their admirers themselves assimilate to the practices of the Gentoos, the Mexicans, and the children of the Sun ; which have not half the imposing dignity of those of our ancestors, the red men of the five nations, as may be seen by any one who will read the account of them by Mr. Colden,* and compare

* See the Cordwainer's Trial, New-York, 1810.

it with the uncouth manners of the Saxon ~~captar-~~
hists. It is true, at the same time, that the Eng^h
eports contain amidst a world of rubbish, rich trea-
sures of experience, and that those of our own
courts contain materials of inestimable worth, and
require little more than regulation and systematic
order. This with fixing and determining the princi-
ples on which they ought to depend, and settling by
positive enactments all doubts that hang upon them,
abolishing for ever all forms that impede the march
of justice, and firmly establishing those which are
needful to its ends, and translating into plain and
intelligible language, those borrowed, ill-penned sta-
tutes, of which every word gives rise to endless
commentaries, will complete the wished for object.
Particular cases will not then be resorted to instead
of general law. The law will govern the decisions
of judges, and not the decisions the law. Judg-
ments will be *legibus non exemplis*. And it will not
be necessary that at least one victim should be sacri-
ficed to the making of every new rule, which without
such immolation would have no existence.

Our jurisprudence then will be no longer intricate
and thorny; nor will it need those fictions, which
give it the air of occult magic, or those queer and
awkward contrivances, which, by rendering it ridi-



culc greatly diminish its dignity and efficacy. We shall be delivered from those odious volumes of special pleading, which cannot be used without degrading and lowering the tone of moral sentiment: which destroy by their verbose jargon, the very end of logical precision at which they profess to aim: where the suitor's story is told in twenty different ways, and answered in as many, and must be hunted for with fear and trembling in printed books, (but, oh! such books!) and made conformable to precedents composed before the party was in being, and which, in no one single instance, conform to the truth: insomuch, that he who dares to tell his case according to the simple and honest truth, will for that very reason, if for no other, fail in his suit. We shall be delivered too from those ever increasing swarms of foreign reports and treatises, which darken the very atmosphere by their multitude, and generate their kind amongst us, and against which we must either rise in arms, as certain oriental nations are said to do against the flights of locusts, or else abandon our own fair fields, and the fruits of our own genial soil, to their pernicious action.

Sir Edward Coke,* complains, in the words of Solomon, that of writing of books there is no end.

* 2 Rep. Pref.

He however wrote, and not sparingly. He also says, quoting Seneca, "it matters not how many books thou hast, but how good: multitude of books do rather burden than instruct, and it is far better, thoroughly to acquaint thyself with a few authors, than to wander through many." * "The ancient order of argument," he says, "was altered, for formerly the citing was general, but always true in the particular, and now the citing is particular, and the matter many times mistaken in general." "Few cases," he says, "were cited of old, but very pithy and pertinent; and now, in such long arguments, with such a farrago of authorities, it cannot be but there is much refuse. This were easily holpen, if the matter, which ever lieth in a narrow compass, were first discerned, and then, that every one, that argueth at the bar, would either speak to the purpose, or be short." What would he say to us, in this land of common sense, where all the books he enumerates would not be missed off the shelves of a young attorney, and where the arguments of counsel are reported by clouds of cyphers, indicating nothing but the pages of books most commonly cited as law for both sides? Would he not say, that the evil required a speedy cure?

* 10 Rep. Pref. § 27.

The best reason urged for the adherence to English precedents, is the preserving of uniformity amongst the sister states. It has not, nor cannot answer this end. This evil of divergence has already begun,* and can only be remedied by erecting the standard of simple wisdom, to which all may rally : for there is nothing so uniform as truth, nor so simple as wisdom. Folly cannot form a bond of union amongst enlightened men, but reason may.

Of simplicity, be it observed however, there are two periods. The first, where uncultivated human beings, with few ideas and few wants, pursue, like other gregarious animals, the instinctive habits of their species. To that state we can no more return than be again born of our mothers. The other period of simplicity is that of mature wisdom, where many ideas are referred to few and general principles. To this we must labour to attain: to this perfection we must endeavour to bring that law, which is our birthright, our blessing, and our safeguard. And let us lose no time ; the moment is propitious. Whilst darkness lowers, and war threatens, and tyranny and superstition assert their ancient empire over other nations, let us improve the auspicious

* See Judge Griffith's Annual Register.

moments of peace and happiness to strengthen ourselves with institutions worthy of our destinies.

Whilst yet a remnant of those patriot sages to whom we owe the blessings we enjoy, still linger on the stage where they so nobly have discharged their part, let them perceive that their generous labours are not lost, and that their children will be worthy of their bright inheritance. It is for this generation to fill up the outlines traced by the inspiration of their sires, until the glowing canvas shall present one pure harmonious image of enduring wisdom, giving to all regenerated nations a model of judicial polity equal to that already exhibited in our political institutions. When this is done, and our untrammelled jurisprudence shall expand to the measure of our growing fortunes, its history will no longer resemble that reservoir or fountain so often troubled, and so rarely limpid, but rather be imaged, if we must speak in metaphor, by a mighty river, which in some lonely barren desert, first issues from its native rock. When yet a slender stream it only serves to slake the tyger's thirst, and that of his fellow savage man. Next a foaming torrent, wild as the scenes through which it drives its headlong desultory course. By a predestined ordinance descending still, it gains the fertile plain. Uniting there with kindred waters and tri-

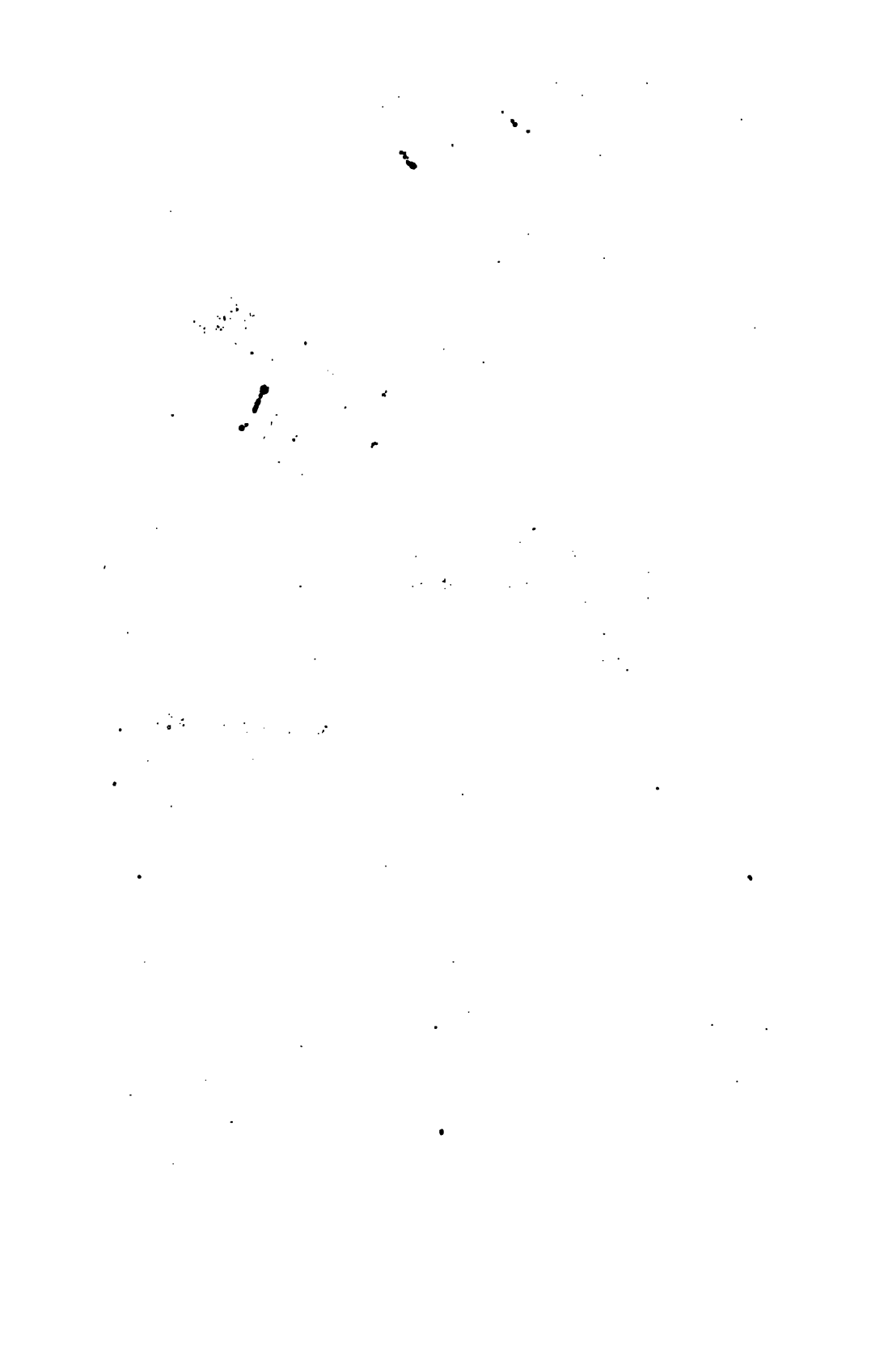
butary streams it takes a milder aspect, and on its polished surface stand reflected, commerce, and arts, and all that can embellish sublunary scenes. till last of all it feels the ocean's swell, and bears upon its heaving bosom the wealth of nations and treasures of the earth.

ERRATA.

Page 36, line 18, for Fuit, read *Fert.*

Page 38, line 18, for affairs, read *repairs.*

Page 40, line 15, for decrees of the chancery, read *service of the Church.*





3 2044 019 618 057

THE BORROWER WILL BE CHARGED
AN OVERDUE FEE IF THIS BOOK IS
NOT RETURNED TO THE LIBRARY ON
OR BEFORE THE LAST DATE STAMPED
BELOW. NON-RECEIPT OF OVERDUE
NOTICES DOES NOT EXEMPT THE
BORROWER FROM OVERDUE FEES.

CHANGE

WIDENER
BOOK DUE

~~FEB 10 1993~~

